

CRIMINAL YEAR SEMINAR

April 15, 2016 - Tucson, Arizona
May 6, 2016 - Phoenix, Arizona
May 13, 2016 - Chandler, Arizona



2015 CRIMINAL PROCEDURE UPDATE

Presented By:

The Honorable Michael Jones (Retired)

Maricopa County Superior Court
Phoenix, Arizona

&

The Honorable Dave Cole (Retired)

Maricopa County Superior Court
Phoenix, Arizona

Distributed By:

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Criminal Rules 2016

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Rule 6.1 Right to Counsel



Rule 6.1, Ariz. R. Crim. P.

c. Waiver of Rights to Counsel. A defendant may waive his or her rights to counsel under (a) and (b), in writing, after the court has ascertained that he or she knowingly, intelligently and voluntarily desires to forego them. When a defendant waives his or her rights to counsel, the court may appoint an attorney to advise him or her during any stage of the proceedings. Such advisory counsel shall be given notice of all matters of which the defendant is notified.



State v. Carlson, 237 Ariz. 381,
351 P.3d 1079 (2015).



Facts:

- Carlson was 'friends' with Larry
- Carlson tied victims Becky & KR up and ordered them into trunk of car. When Becky worked loose, he shot them both.
- Burned the bodies in a pit until they were ash & bone fragments.
- Convicted of 2 cts kidnapping & 2 cts first degree murder.
- Death penalty imposed

State v. Carlson



- Carlson submits handwritten motion for change of judge at the beginning of the sentencing hearing.
- Claims trial judge erred in failing to refer to presiding judge for ruling.

State v. Carlson



- "A represented defendant may not file motions in addition to those the attorney files."
- Defendant who is represented by counsel is not entitled to hybrid representation, citing *State v. Cornell*, 179 Ariz. 314, 325, 878 P.2d 1352, 1363 (1994).
- No error.

State v. Coven, 236 Ariz. 393, 345 P.3d 1101 (Ct. App. 2015).



Facts:

- *Daniel Coven was charged (and convicted of): resisting arrest and disorderly conduct, both class one misdemeanors.*
- *Coven photographed a court clerk at SEF & became loud & abusive when security attempted to arrest him.*

State v. Coven



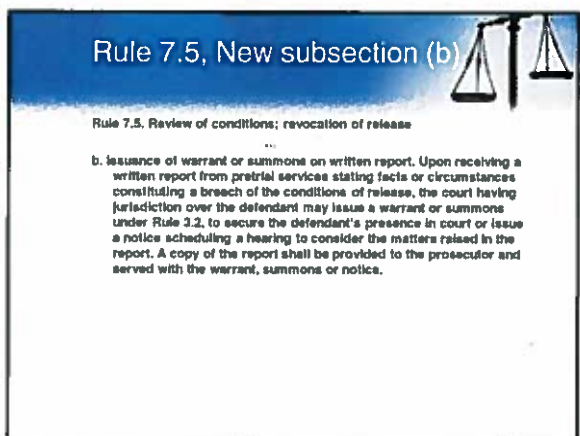
- *Defendant claims the court erred in allowing his fourth privately retained counsel to withdraw, without appointing counsel to represent him.*
- *Coven was not indigent.*
- *Counsel moved to withdraw 34 days prior to trial for ethical reasons counsel could not state specifically on the record due to the attorney-client privilege. Counsel explained that there was an irremediable breakdown in the atty-client relationship, not related to fees.*

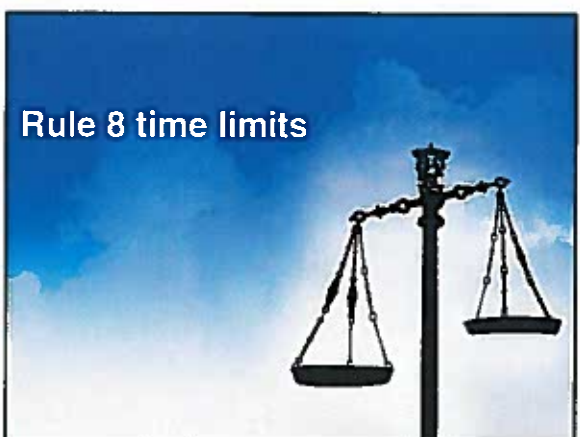
State v. Coven



- *Coven claims the trial judge erred in failing to determine if he waived his right to counsel voluntarily.*
- *In the absence of an express waiver, a defendant may implicitly waive the right to counsel through his conduct.*
- *Here, Coven's conduct was unreasonable, & clearly aimed at thwarting his prosecution. He had delayed his trial for two years following the incident.*







State v. Dalton, ____ Ariz. ____,
P.3d ____ (Ct. App. 2015).



- Two grand jury indictments; when does the Rule 8 clock start to run?
- grand jury indicted defendant for criminal trespass, and then on 1/21/14, another grand jury indicted defendant for second-degree burglary and criminal damage; 3/13/14, trial court dismissed criminal trespass charges on state's motion; court held time limits ran from 1/21/14 indictment

State v. Dalton



- When the State elects to refile charges, the Rule 8 time limits begin to run from the date of the *second arraignment*.
- No Rule 8 violation.

State v. Dalton, ____ Ariz. ____,
P.3d ____ (Ct. App. 2015).



- Rule 18.5(h) requires that once jury deliberations have started, the court must instruct jury to begin deliberations anew, if an alternate juror is called to take the place of a deliberating juror.

Rule 8.5 Continuances



State v. Burns, 237 Ariz. 1, 34 P.3d 303 (2015).



- Johnathan Ian Burns was charged & convicted of sexual assault, kidnapping, first degree murder, and weapons misconduct. Death sentence imposed.
- Trial judge had granted 3 defense motions to continue. Denied 3 more.
- Issue on appeal is whether Burns was denied ability to prepare his mitigation case for trial.

State v. Burns



- "In determining whether a defendant's rights were violated, this Court looks to the totality of the circumstances."
- "[T]ime constraints by themselves do not create prejudice."
- "Under Rule 8.5(b), the trial court must consider the victims' right to a timely resolution of the charges...."

State v. Burns



- Burns failed to show prejudice.
- Burns claimed he was unable to prepare and present important mitigation evidence; however, his 12 days of mitigation evidence included much of that he claimed he could not present.
- No abuse of discretion by the trial judge.

Discovery

State v. Burns, 237 Ariz. 1, 34 P.3d 303 (2015).



- Rule 15.2(d) requires defendants to disclose witnesses 40 days after arraignment or 10 days after the prosecution's disclosure.
- Burns disclosed that he intended to call Dr. Joseph Wu less than one week prior to the commencement of the penalty phase (he intended to call Dr. Wu to testify as a mitigation witness about the results of PET scans of his brain).
- Trial judge allowed Dr. Wu to testify

State v. Burns

- However, the trial judge precluded Dr. Wu from testifying about his "quantitative analysis" of defendant's brain.
- Dr. had admitted in initial testimony that he had not performed an quantitative analysis, but during a court recess, he performed such an evaluation.

State v. Burns

- Under Rule 15.7(a), preclusion of a witness should be a remedy of last resort.
- The criteria for determining whether preclusion of a witness is appropriate come from *State v. (Joe U.) Smith*, 140 Ariz. 355, 359, 681 P.2d 1374, 1378 (1984):
 1. How vital the witness is to the case;
 2. Whether the opposing party will be surprised;
 3. Whether the discovery violation was motivated by bad faith;
 4. Any other relevant circumstances.


State v. Burns

- Here, application of the *Smith* criteria:
 1. The additional testimony was not critical—Dr. Wu had already provided his opinion;
 2. The prosecution was unfairly surprised;
 3. No indication of bad faith;
 4. Trial judge did not preclude the testimony entirely— she ordered that Dr. Wu's data be provided to the prosecution expert as a prerequisite to Dr. Wu's testimony about quantitative analysis. Defendant never provided that info/data.

New amendments to Rules 14.2 & 14.3 & 26.3,

providing for loss of right to direct appeal when Defendant fails to appear for sentencing after trial






Amendments require that defendants be provided notice that following a conviction based on a trial, if the defendant's absence prevents the sentencing from occurring within 90 days, the defendant will lose the right to have an appellate court review the proceedings by way of a direct appeal.

Amendments to Rules 15.5 and 39

Confidential & privileged information:
victim identifying information



New section (e) to rule 15.5


Rule 15.5. Excision and protective orders

...

e. Claims of Privilege or Protection. All redactions must be identified in documents produced in discovery and the party making a redaction must state its legal basis if it is not clear from the context.

New section 10 to Rule 39

10. The right to require the prosecutor to withhold, during discovery and other proceedings, the victim's date of birth, social security number, official state- or government issued driver license or identification number, home address, telephone number, e-mail address, the address and telephone number of the victim's place of employment, and the name of the victim's employer; provided, however, that for good cause shown by the defendant, the court may order that such information be disclosed to defense counsel and may impose such further restrictions as are appropriate, including a provision that the information shall not be disclosed by counsel to any person other than counsel's staff and designated investigator and shall not be conveyed to the defendant. Rule 15.5(e) applies to information withheld pursuant to this rule.

State v. Greenberg, 236 Ariz. 592, 343 P.3d 462 (Ct. App. 2015). 

- Issues:
 - Finality of rulings on pretrial motions;
 - “law of the case”
- David Greenberg convicted of Sexual Exploitation of a Minor & related crimes.

State v. Greenberg



- police suspected defendant of trespass and looking through window at juvenile female; police interviewed defendant, and he confessed to trespass (8/27 confession);
- police developed further information about defendant and obtained warrant to search his home and car; police found numerous CDs and DVDs containing child pornography, sexually explicit videos of unknowing victims filmed by defendant, and hand-held camera; police again interviewed defendant, and he confessed owning evidence police found (8/31 confession);
- state charged defendant with trespass and 10 counts of sexual exploitation of minor; defendant moved to suppress 8/27 confession and evidence seized from his home; trial court suppressed 8/27 confession on basis that it was result of implied promise and suppressed evidence because it concluded affidavit did not provide magistrate with probable cause;
- state dismissed all charges except 8/27 trespass charge and appealed suppression of seized evidence, but did not appeal suppression of 8/27 confession;

Rule 16.1



d. Finality of Pretrial Determinations.

Except for good cause, or as otherwise provided by these rules, an issue previously determined by the court shall not be reconsidered.

State v. Greenberg



- during pendency of appeal, defendant pled guilty to 8/27 trespass charge;
- on appeal, court held trial court erred in suppressing seized evidence;
- following remand, state filed numerous charges against defendant under new cause number that was assigned to different judge;
- defendant moved to suppress both confession and contended trial court was barred from reconsidering 8/27 confession;
- trial court ruled both confessions were admissible;
- court held law of the case doctrine and Rule 16.1(d) applied in same case and that, because state had charged defendant under new cause number and with more charges than in first cause number, prosecutions were not "same case" and thus trial court was not precluded from making new determination about 8/27 confession.

Rule 17 – Plea negotiations & plea agreements



State ex rel. Polk v. Hancock (Ferrell),
237 Ariz. 125, 347 P.3d 142 (2015).



- Yavapai County Attorney adopted a policy of including in all plea agreements a provision requiring a condition of probation that regardless of AMMA, the defendant shall not possess, buy, grow or use marijuana in any form.
- Ct. of Appeals disapproved of blanket policy of placing this provision in plea agreements.
- Supreme Ct. held trial court could not impose such condition for person permitted to use marijuana under AMMA.
- But, state was then permitted to withdraw from plea agreement.

Reed-Kaliher v. Hoggatt, 237
Ariz. 119, 347 P.3d 136 (2015).



- Keenan Reed-Kaliher plead guilty to possession of marijuana for sale and att. Possession of a narcotic drug for sale.
- A condition of his probation required him "to obey all laws."
- Defendant obtained certification to use marijuana under Ariz. Medical Marijuana Act (AMMA).
- Trial court abused discretion in refusing to modify conditions of probation to remove prohibition against using marijuana.

Rule 18.5

Replacing jurors during deliberations



State v. Kolmann, ___ P.3d ___ (3/16/16).



A jury in 2010 found Knute Kolmann guilty on ten counts of sexual exploitation of a minor and one count of conspiracy to commit sexual exploitation of a minor.

On the sixth day of trial, after the jury had deliberated for several hours, the jury foreperson sent the trial judge a note stating that juror L.M. wanted to discuss a personal matter. The judge, in the presence of counsel, called L.M. back into the courtroom and asked, "What is your concern?"

L.M. responded that she did not feel qualified to be a juror, stating "I feel like I can't judge anybody" and that she "was wrong" in not saying so earlier.

Without objection by counsel, the judge excused L.M. from the jury and replaced her with an alternate juror.

State v. Kolmann, ___ P.3d ___ (3/16/16).



Under Arizona Rule of Criminal Procedure 18.5(h), trial judges have broad discretion to excuse a deliberating juror "due to inability or disqualification to perform required duties," and to substitute an alternate juror.

Once L.M. disclosed she could not judge anybody for personal reasons, the judge was authorized to replace her with an alternate.

Defense counsel did not act incompetently by failing to object to what Rule 18.5(h) expressly allowed.

State v. Dalton, ___ Ariz. ___,
P.3d ___ (Ct. App. 2015).



- Rule 18.5(h) requires that once jury deliberations have started, the court must instruct jury to begin deliberations anew, if an alternate juror is called to take the place of a deliberating juror.

Rule 21

Lesser-included offense instructions



Rule 21 – Jury Instructions



Lesser-included offenses:

The trial court must instruct on the offense charged and any offense necessarily included in the charged offense if the evidence supports such a lesser-included offense, and both the defendant and the state are entitled to such a lesser-included offense instruction.

State v. West, 238 Ariz. 482, 362 P.3d 1049 (Ct. App. 2015).



- defendant was charged with committing child abuse, which is an "alternative means statute," also described as single unified offense, in which a person can commit in one of three different ways.
- Because child abuse is a single unified offense that can be committed in different ways, and because the trial court concluded that the State's evidence showed that all acts committed by West were part of a single transaction, court was under no obligation to instruct jurors that they had to unanimously find that West committed child abuse in a particular way, as substantial evidence existed that the defendant had committed the offense in all possible ways that the crime could be committed.

Also, in *West*...




- Rule 24.1(c) / Although cumulative error doctrine does apply in cases where defense claims prosecutorial misconduct, supreme court held that application of doctrine did not require reversal of trial court's order denying motion for new trial.


State v. Veloz, 236 Ariz. 532, 342 P.3d 1272 (Ct. App. 2015).



- Veloz was charged with committing organized retail theft by concealing several DVDs in a shirt, and walking out of a store without paying for the shirt or the DVDs.
- §13-1819(A) prohibits a person from using "an artifice, instrument, container, device or another article to facilitate the removal of merchandise from a retail establishment without paying the purchase price." It is a class 4 felony.


State v. Veloz 

- Veloz claims the trial court erred in failing to give a lesser-included offense instruction for the crime of shoplifting.
- Because shoplifting is not a lesser-included offense, the trial court did not err in failing to instruct on that offense.

RULE 22.5 JURY VERDICTS 

The court shall discharge the jurors when:

- a. Their verdict has been recorded as set forth in Rule 23 (after polling, if requested)....

State v. Hansen, 237 Ariz. 61, 345 P.3d 116 (Ct. App. 2015). 

- The jury returned verdicts finding defendant Hansen guilty of Aggravated Assault, but not guilty of the lesser-included offense of Simple Assault!!!
- The trial judge granted a mistrial.
- State appeals, but has no right to appeal.
- Ct. of Appeals exercises special action jurisdiction to address the issue.
- Are these valid verdicts that require a mistrial???

State v. Hansen

- A valid verdict is one which is unambiguous, unqualified, and certain.
- A verdict is not binding until the trial court accepts it.
- Historically, Ariz. Courts have been permitted to reinstruct jurors and instruct them to continue deliberations when they have returned with defective verdicts.
- Here, the trial judge did not abuse his discretion in granting a mistrial– though he could easily have reinstructed the jurors!!!

Rule 23 Verdicts-
lesser-incl. offenses

The specification of an offense in the charging document constitutes a charge of that offense and all necessarily included offenses, and so the trial court shall submit forms of verdict for all necessarily-included offenses and related offenses supported by the evidence.

State v. Lua, 237 Ariz. 301,
350 P.3d 805 (2015).

- defendant was charged with attempted second-degree murder;
- evidence was presented that defendant may have attacked victim upon sudden quarrel or heat of passion resulting from adequate provocation by the victim (provocation manslaughter);
- Provocation manslaughter is not lesser-included offense of second-degree murder.

State v. Lua


- Because the evidence showed defendant could have committed provocation manslaughter, trial court correctly instructed jurors on that offense, regardless whether it was a lesser-included offense or not.

State v. Erivez, 236 Ariz. 472, 34 P.3d 514 (Ct. App. 2015).

- defendant was charged with aggravated assault;
- because *disorderly conduct by recklessly displaying or handling firearm* and *simple assault* are both lesser-included offenses of aggravated assault, trial court properly gave jurors instructions on both disorderly conduct and simple assault in addition to instruction on aggravated assault.

State v. Erivez


- The jury convicted Erivez of both lesser offenses (*disorderly conduct by recklessly displaying or handling firearm* and *simple assault*)!!!
- May a defendant be convicted of multiple independent lesser-included offenses of a greater charged offense???
- YES, the aggravated assault charge gave Erivez sufficient notice that he could be convicted of either of the lesser-included offenses.



Rule 24


**Post-Trial
Motions**

State v. Fischer, 238 Ariz. 309, 360 P.3d 105 (Ct. App. 2015).




- Robert Fischer is found kneeling over the body of his son-in-law, Lee Radder (step son-in-law).
- Radder has Fischer's gun in his hand– a contact gunshot wound to the right eye.
- The issue at trial was suicide or murder???
- A jury found Fischer guilty of Second Degree Murder.
- Trial judge granted Motion for New Trial.
- State appeals & Ct. of Appeals reverses grant of new trial, reinstates guilty verdict.


State v. Fischer





- Standard for granting a motion for new trial includes when the verdict is contrary to the evidence– Rule 24.1(c)(1).
- Trial court is permitted to weigh evidence & make credibility determinations– to act as a “thirteenth juror.”
- However, courts are directed to act with great caution to avoid interfering with the parties' rights to a jury trial.
- Standard of appellate review is “abuse of discretion.”


State v. Fischer 

- Trial court abused discretion in granting defendant's motion for new trial— Reversed & reinstated guilty verdict.
- Court of Appeals concluded trial court abused discretion in granting motion for new trial because
 - (1) made factual findings not supported by record,
 - (2) failed to consider certain evidence in record,
 - (3) improperly rejected certain testimony,
 - (4) failed to weigh incriminating nature of certain evidence,
 - (5) placed too much weight on certain exculpatory evidence, and
 - (6) inaccurately characterized state's theory of murder.



 **Rule 32** 

Post-Conviction Proceedings

State v. Goldin, ___ Ariz. ___, P.3d ___ (Ct. App. 2015). 

- Goldin pled guilty to Second Degree Murder, and stipulated in the plea agreement that his sentence would run consecutive to a sentence he was currently serving. Goldin was sentenced 1/31/13.
- He filed his first PCR on 2/10/14— it was dismissed.
- Goldin filed his second PCR on 4/16/14 claiming ineffective assistance of counsel— that he was incorrectly advised by counsel of the start date of his sentence.

State v. Goldin

- The state argued that Goldin's PCR claim was untimely and precluded (by his failure to raise it previously in the 1st PCR).
- In *State v. Diaz*, 236 Ariz. 361, 340 P.3d 1069 (2014), the Ariz. Supreme Ct. allowed a 3rd PCR to raise IAC (ineffective assistance of counsel) for the first time because the defendant had never waived that claim, when through no fault of his own, his attorneys failed to timely file and raise the issue.
- Based upon *Diaz*, the Ct. of Appeals remands for determination whether Goldin is entitled to PCR relief.

State v. Amaral,
__P.3d.__(2/4/16).

In 1993, Travis Amaral pleaded guilty to two counts of first-degree murder and one count of attempted armed robbery for crimes committed when he was sixteen years old.

In his Rule 32 PCR, he claimed that advances in juvenile psychology and neurology in the intervening twenty-two years support a "colorable claim" of newly discovered evidence requiring an evidentiary hearing on Amaral's petition for post-conviction relief.

Because the sentencing court considered the distinctive attributes of Amaral's youth, we hold that Amaral did not present a colorable claim.

State v. Amaral,
__P.3d.__(2/4/16).

There are five requirements for presenting a colorable claim of newly discovered evidence:

- (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
- (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention;
- (3) the evidence must not simply be cumulative or impeaching;
- (4) the evidence must be relevant to the case;
- (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial

State v. Amaral



Although the research itself was conducted after Amaral's sentencing, the results of the research cannot constitute newly discovered material facts because juvenile behavioral tendencies and characteristics were generally known in 1993, and the trial judge contemplated Amaral's youth and attendant characteristics when he considered Amaral's age, immaturity, and personal idiosyncrasies at the sentencing hearing.

Amaral



- As a preliminary matter, we clarify the standard for entitlement to a Rule 32.8(a) evidentiary hearing on claims made under Rule 32.1(e). A defendant is entitled to relief if "newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e).

Amaral



- A standard based on what "might" have changed the sentence or verdict is inconsistent with Rule 32 and most of the case law.
- *The relevant inquiry for determining whether the petitioner is entitled to an evidentiary hearing is whether he has alleged facts which, if true, would probably have changed the verdict or sentence.*

Rule 38(d) Rules of the Supreme Court

Rules of Professional Conduct

- Rule 38(d)(5) (C)(i)(c) permits *certified limited practice students* to represent defendants in "...any felony criminal defense matter in justice, municipal, and magistrate courts, and any criminal matter in superior court, [and] the supervising attorney (or designated attorney) must be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted (emphasis added)."

State v. Terrazas, 237 Ariz. 170, 347 P.3d 1151 (Ct. App. 2015)

- Esteban Terrazas was charged with Aggravated Assault and First Degree Murder. In his first trial, he was acquitted of the Agg Assault charge, and a mistrial was declared as to the murder charge. He was represented by counsel and a law student certified under Rule 38(d).
- After his second trial he was convicted of manslaughter. At this trial Terrazas was represented by the same counsel and the law student, who had now graduated and taken the bar examination, but had not passed the examination. The Rule 38(d) certification had lapsed.

State v. Terrazas



- Terrazas claims he was denied his right to counsel because the law student's certification had lapsed and he had not been admitted to the bar.
- Both trial court and Ct. of Appeals denied the claim as Terrazas was continuously represented by the law student's supervisory counsel at all times.
